IN THE

Supreme Court of the United States

No. 76-613

OCTOBER TERM, 1976

FRANCIS X. DONOVAN,

Petitioner,

-against-

PENN SHIPPING CO., INC.
and PENN TRANS. CO., INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FREDERICK POSSES
Attorney for Petitioner
11 Broadway
New York, N.Y. 10004

Dick Bailey Printers, 290 Richmond Ave., Staten Island, N.Y. 10302
Tel.: (212) 447-5358

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

UNITED STATES SUPREME COURT

FRANCIS X. DONOVAN,

Petitioner,

-against-

PENN SHIPPING CO., INC.
and PENN TRANS. CO., INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully prays for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit which dismissed petitioner's appeal from a judgment in his favor in the amount of $65,000 entered after petitioner had accepted under protest a remittitur from the jury's verdict in his favor in the amount of $90,000.

THE OPINION OF THE COURTS BELOW

The decision of the United States District Court for the Southern District of New York by Judge Murray I. Gurfein ordering a new trial unless plaintiff agrees to a remittitur of $25,000 of his $90,000 jury award is appended hereto (app.

A), as is the memorandum decision of Judge Henry F. Werker modifying the judgment (app. B); the opinion of the United States Court of Appeals for the Second Circuit dismissing the appeal, 536 F2d 536, together with the dissenting opinion of Judge Wilfred Feinberg is appended hereto (App. C). A petition for rehearing and/or rehearing *in banc* to the United States Court of Appeals was denied on August 4, 1976.

The decision and order of the United States Court of Appeals for the Second Circuit sought to be reviewed was decided June 8, 1976, and is appended hereto (app. D).

The order denying rehearing is appended hereto (App. E).

The jurisdiction of this Court to review by writ of certiorari the order complained of is conferred by 28 USC Sections 1254(1) and 2101(c).

BACKGROUND RELEVANT TO QUESTIONS PRESENTED

The right of a plaintiff to appeal a remittitur order was last considered by this Court fifty-nine years ago in *Woodworth v. Chesbrough*, 244 US 79 (1917). In that case, involving damages for violations of the National Bank Act, plaintiff consented under protest to a remittitur by the Court of Appeals. This Court held that such consent precluded an appeal. Despite the obvious injustice of a rule which might force plaintiff onto a potential treadmill, forever winning jury awards only to have them nullified by the court, it persisted in all the circuits for many years.

In 1963, the Fifth Circuit, realizing that in order to get off the treadmill, the plaintiff needs a final judgment from which to appeal, recognized that a plaintiff who had not "actually obtained the fruits of a judgment" might be allowed to appeal from a remittitur accepted under protest

without offending the final judgment rule of 28 USC 1291. The case was *Delta Engineering Corp. v. Scott*, 322 F2d 11 (1963). Finding no abuse of discretion in the trial judge's remittitur order in the case before it, the Court declined to reach the issue of power to review, noting only that "it would be a strange rule that would keep a plaintiff from challenging the legal correctness of any action having such portentous consequences."

Three years later, in *Steinberg v. Indemnity Insurance Co.*, 364 F.2d 266 (1966), the Fifth Circuit found that the trial court had abused its discretion in ordering a remittitur. The plaintiff in that case had first attempted to skirt the waiver issue by appealing the remittitur order itself, without accepting or rejecting it. The Fifth Circuit initially refused to review on the ground that the order remained interlocutory. When, however, the plaintiff accepted the remittitur conditionally as a means to appeal, the court found that she had "suffered a sufficiently adverse adjudication to allow an appeal." It was noted that plaintiff had not collected the judgment.

It might be argued that both of the above cases differed from *Woodworth* in that the plaintiffs had not actually collected the reduced judgments they sought to overturn, whereas Woodworth apparently had. But in *United States v. 1160.96 Acres of Land*, 432 F2d 910 (5th Cir. 1970), the court was presented with a case in which even this tenuous distinction could not be made, since the plaintiffs had collected the reduced judgment and had still appealed the remittitur. In response to this challenge, the Fifth Circuit attempted to draw a different distinction:

> "But Woodworth implies that the judgment creditor has a real choice between taking a sure sum and putting the case to another trial, and that the only detriment suffered is the risk that on the conditionally ordered retrial, the recovery will be

even less than the reduced amount of the remittitur." 433 F2d at p. 912

The Court then went on to point out all of the other pressures and financial losses which effectively deprive a plaintiff of a free choice under these circumstances, and, finding the order appealable, reversed.

The Sixth Circuit has adopted a different approach, allowing an appeal from a remittitur order in diversity cases where the state procedure sanctions such practice. c.f. *Mooney v. Henderson Portion Pack Co.*, 334 F.2d 7 (1964) and *Manning v. Altec, Inc.*, 488 F2d 127 (1973). All the other circuits which have considered the problem have followed *Woodworth.*[1, 2]

The Second Circuit, though refusing to be bound by State Court procedure, nevertheless considered and rejected plaintiff's claim that the trial court had abused its discretion in granting a remittitur in *Burris v. American Chicle Co.*, 120 F.2d 218, 223 (1941), a case in which all parties appealed. However, eight years later an order of remittitur was held not to be appealable in *Mattox v. News Syndicate Co.*, 176 F2d 897 (2nd Cir. 1949), like *Burris*, a diversity case.

In *Reinertsen v. George W. Rogers Construction Corp.*, 519 F2d 531 (2nd Cir. 1975) plaintiff, a seaman, was

1. Citations will be omitted. However, three excellent law review articles, all of which were cited by Judge Feinberg in his thoughtful dissenting opinion in the instant case, review the pertinent cases. They are: Remittitur Review: Constitutionality and Efficiency in Liquidated and Unliquidated Damage Cases, 43 Chi.L.Rev. 376 (1976) ("Chicago Note"); Recent Developments, 44 Fordham L.Rev. 845 (1976); Note: Appealability of Judgments Entered Pursuant to Remittiturs in Federal Courts, 1975 Duke L.J. 1150 (1975) ("Duke Note"). Petitioner has borrowed liberally from these notes in drafting this petition.

2. In *Thomas v. E. J. Korvette*, 476 F2d 471 (3rd Cir. 1973), the plaintiff cross-appealed from a remittitur order, but the Third Circuit did not reach the question, as it ordered a new trial on defendant's appeal.

awarded $75,000 by a jury in the United States District Court for the Southern District of New York for injuries sustained in the course of his employment. The trial judge ordered a new trial unless plaintiff agreed to accept $45,000. Plaintiff sought to have a final judgment entered "under protest" for $45,000, but the trial court refused to do so, and plaintiff's petition for a writ of mandamus requiring the court to do so was denied. A second trial resulted in a $16,000 verdict and judgment. Reinertsen appealed, but died shortly before the appeal was heard. The Second Circuit affirmed, finding no abuse of discretion in the granting of the remittitur. As to plaintiff's contention that he should have been permitted to appeal directly from the order of remittitur without undergoing a second trial, the court discussed the practice of the Fifth Circuit, but commented that it would be reluctant to depart from the traditional rule without answers to questions as to the effect that such a practice would have on the combined caseloads of the district and appellate courts. In any event, said the Court, Reinertsen could not properly raise the question, because he did submit to a second trial at which he might have recovered more than $45,000. Thus, said the Court, "We must leave the interesting problem canvassed here to another day.[3]

In *Evans v. Calmar SS Co.*, 534 F2 519 (2d Circ. 1976) an injured seaman had a jury verdict against his employer for $60,000. The trial court granted a new trial unless plaintiff agreed to a remittitur to $40,000, such new trial to be limited to the issue of damages. A jury was empanelled, and some evidence taken. The judge presiding at the second trial ruled that the jury should also consider the issue of comparative negligence on behalf of the plaintiff. When plaintiff's counsel protested, the trial court, with the consent of defense counsel, permitted plaintiff to accept

3. 519 F.2d at p. 536.

the $40,000. Plaintiff appealed. The Second Circuit dismissed the appeal. Although the opinion clearly stated that the Court saw no reason to modify the long standing rule that an order for a new trial was not appealable, it seemed to rest its dismissal on the fact that Evans had caused defendant's attendance at a retrial, and thus his acceptance of the remittitur was tantamount to a settlement. When his petition for rehearing was denied, Evans, in poor health and impoverished circumstances, called it a day and satisfied the $40,000 judgment.[4]

In the case at bar, Donovan, a seaman, was awarded $90,000 by a jury for serious personal injuries which had substantially impaired his earning capacity. The trial judge, in a memorandum containing a detailed but incorrect review of the evidence and allowable damages, ordered a new trial unless plaintiff accept a remittitur to $65,000. Plaintiff moved for reargument, and pointed out to the court the errors and omissions in its analysis of the evidence.[5] The motion was denied. Donovan accepted the remittitur under protest and appealed to the Court of Appeals for the second Circuit, which over a strong dissent by Judge Feinberg, dismissed, saying:

> "We therefore answer the question left open in *Reinertsen* and alluded to although not decided in *Evans*, by holding that a plaintiff who accepts an order of remittitur, with or without qualifications, is bound by his acceptance and may not later challenge the order by seeking review in the court of appeals"

Fifty-nine years have elapsed since *Woodworth*. Who knows how many litigants like Reinertsen have been forced

---

4. Reinertsen, Evans and Donovan were all represented by the same attorney, Paul C. Matthews.

5. These will be itemized *infra* at page 11.

to undergo a second expensive trial before obtaining a determination as to whether or not a trial court acted within the permissible limits of its discretion in taking away from them an award made by the Constitutionally fact-finder. Who knows how many litigants like Evans, seriously injured through the negligence of their employers, have been coerced into taking less than what a jury has found to be proper damages? Is the time not now ripe for this Court to decide the following questions?

QUESTIONS PRESENTED FOR REVIEW

1. Where there has been a jury verdict in favor of the plaintiff and where the trial court has denied defendant's motion for a new trial upon the condition that plaintiff accept a lesser sum than the amount awarded him by the jury, may the plaintiff accept such remittitur under protest, unconditionally waive his right to a new trial, and still obtain appellate review of the trial court's action on the basis of mistake or abuse of discretion, or must plaintiff first submit to the delay, expense and anguish of a second or third trial before obtaining appellate review of the trial court's order?

If the first question be deemed too broad, then

2. Where a jury verdict finds ample support in the evidence, and where the trial court in granting a remittitur has demonstrated in its opinion that it has omitted items of damage which find proper support in the trial record and has made patent errors in its review and analysis of the evidence, and where counsel has pointed out the errors and omissions to the trial court, may the plaintiff obtain appellate review of these errors and omissions without first being forced to undergo a second trial?

STATUTE INVOLVED

28 USC 1291. Final decisions of district courts. "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929."

RELEVANT FACTS

Donovan was an able-bodied seaman employed by defendant on the SS Penn Sailor. On June 4, 1970 he slipped on wet paint and fell, landing with his right arm outstretched and sustaining a badly broken left wrist, a compound fracture with the radius bone shattered into many pieces, and a fracture dislocation of the right elbow with tearing of the ligaments and lining of the joint.

Donovan was removed from the ship by ambulance a few hours after his injury and taken to the Marine Hospital in Staten Island, where the fractured wrist was reduced, the elbow put back into joint, and a cast applied to the right arm. His pain was sufficiently severe to require intramuscular injections of demerol for a number of days. About three or four days after the initial reduction of the fractured wrist, the doctor tried to straighten the hand out by putting wedges in the cast in order to change the position of the bones. This was done without anesthesia and was very painful. Donovan's right arm remained in one cast for over three weeks, and a second cast for about a month. He is right handed.

Donovan remained under the care of the Public Health Service until December 1, 1970. He returned to work in

December, but found that he did not have a strong grip, and that his arm ached for several hours after heavy work. Several times he has had to take time off because his arm was bothering him. He has aching in his arm in damp and cold weather.

The Medical Evidence

Donovan was examined by three orthopedic surgeons not associated with the Public Health Service. Dr. John McGillicuddy saw him on August 28, 1970 and again on December 10, 1970. His deposition was taken on written interrogatories. Donovan was seen in 1971 and again on February 19, 1974 by Dr. Irving Mauer, who testified at the trial, and in March 1971, by Dr. Balensweig, who did not testify.

Dr. McGillicuddy found that the wrist had healed in an abnormal position with the radius bone tilted dorsally causing an abnormal strain on the bones of the wrist which is conducive to traumatic arthritis in years to come. He found limitation of motion of the wrist and elbow. He found contractures of the soft tissues of the right elbow and wrist due to scarring. He expressed the opinion that the plaintiff would have permanent restriction of motion of the right elbow, wrist and hand and over a long period of time will gradually develop traumatic arthritis of these members. It was also his opinion that Donovan will be limited in his work and will have difficulty in using his right arm in work such as painting, handling lines and climbing ladders, since he will not have full use of the arm and it will tire easily, become painful, etc.

Donovan has an obviously deformed right wrist. Dr. Mauer demonstrated this to the jury. Counsel for defendant recognized this in his summation. Not only is there a squashing down and shortening of the radius bone, but the wrist is no longer in the proper position of function at the

end of the arm and this causes limitation of motion and loss of grip.

Dr. Mauer found the following restrictions of motion, all of which are permanent:

60% loss of ulnar deviation
50% loss of dorsiflexion
60% loss of lexion
50% loss of grip compared to the left hand, which had previously suffered a fracture of the left wrist, thus making the actual loss of grip of the right hand about 75%
30% loss of pronation and supination.

All of the above are residua of the fracture of the right wrist, which extended into the joint itself and healed with malunion. In addition the fracture of the right elbow never healed. The plaintiff has an extra chip of bone in the elbow joint, together with scar tissue and calcium deposits, which can cause pain.

Dr. Mauer testified, without contradiction, that the plaintiff would never get better and that it was highly improbable that arthritis would not develop, causing further pain and swelling and limitation of motion. He further testified that the injuries sustained by the plaintiff and their condition as observed by him were such as to make performing a seaman's duties difficult.

Loss of Earnings

The evidence demonstrated that before the accident Donovan had worked about nine months per year, and had worked approximately 140 hours overtime per month, for which he received extra pay. He received free room and board as an incident of his employment. He also received $100 per month vacation pay. During the three years between the time Donovan returned to work and the trial he lost approximately three months per year from work on

account of his injuries, and when working he lost approximately 40 hours per month of overtime. Donovan was 54 years of age at the time of the trial.

Errors in the Court's Analysis

1. The Court found that the evidence justified a finding that Donovan has lost and will lose 40 hours overtime per month during each month that he worked or will work. In the subsequent analysis of damages, the Court then transposed this figure of 40 hours per month and used it instead of the 140 hours per month clearly demonstrated by the evidence as the average number of hours of overtime worked before the accident. Thus, in calculating loss of earnings for the three months per year which the Court found plaintiff could have been found to lose plaintiff was short-changed by 100 hours of overtime per month. In rough figures this error amounted to about $17,000.

2. The Court completely ignored the $100 per month that plaintiff had lost and would continue to lose on account of loss of vacation pay for the 3 months of each year when he was prevented from working. In round figures this oversight cost plaintiff $4,000.

3. The Court allowed nothing for the value of the plaintiff of lost room and board for the same 3 months per year. At $10 per day, this loss amounts to approximately $12,000.

4. In computing future pain and suffering at $3 per day, the Court erroneously used a life expectancy of 16 years, although recognizing earlier in the opinion that the correct figure was actually 20 years. This error cost the plaintiff over $3,500.

The cumulative result of the above errors and omissions is over $36,000. The remittitur was $25,000.

PROCEEDINGS BELOW

The case was tried on February 20, 21 and 22, 1974. In answers to special interrogatories submitted by the court, the jury found that plaintiff's injuries were caused by the fault of the defendant, with no fault of the plaintiff contributing thereto, and fixed plaintiff's damages in the sum of $90,000. After the verdict, defendant moved for a new trial. On August 6, 1974 the Court rendered its opinion granting a new trial unless the plaintiff consents to a remittitur of $25,000.

On August 16, 1974, plaintiff moved for reargument, and filed a brief setting forth specific evidence which the Court had overlooked in its opinion, and at the same time waived his right to a new trial. On September 26, 1974 motion for reargument was denied. On October 3, 1974 plaintiff filed a notice of appeal from the order denying reargument. In July, 1975, at the request of the Court, plaintiff prepared a judgment and presented it to the Court for signature. This judgment which provided for interest from the date of the jury verdict, was entered on August 6, 1975. Defendant moved to amend this judgment so as to delete therefrom any mention of plaintiff's having accepted the remittitur under protest and also to delete the provision for interest from the date of the jury verdict. On November 21, 1975, Judge Henry F. Werker, to whom this case had been reassigned, rendered his decision granting defendant's motion to the extent of striking the award for interest before August 6, 1975. On December 22, 1975 plaintiff filed a notice of appeal from this decision.

REASONS FOR GRANTING THE WRIT

POINT I

THE PROCEDURE OF ALLOWING AN APPEAL FROM A REMITTITUR ACCEPTED UNDER PROTEST IS A MORE JUST RULE OF LAW THAN REQUIRING A LITIGANT WRONGED BY THE ACT OF ANOTHER TO UNDERGO THE EXPENSE, DELAY AND ANGUISH OF ONE OR MORE ADDITIONAL TRIALS.

It is trite but, of course, true to point out that justice delayed is justice denied. The Seventh Amendment guarantees to each citizen the right to trial by jury, and a legion of cases construing the Jones Act and the Federal Employers Liability Act makes it crystal clear that the jury has it within their sole province to resolve disputed issues of fact. How empty is this guarantee if a seaman injured by the negligence of his employer who has had his damages fixed by a jury is given the Hobsonian choice of accepting a lesser amount mistakenly fixed by a trial judge or undergoing, if he can afford the additional delay, the anguish and expense of another trial with no assurance that, if the second jury's evaluation does not agree with that of the judge, he may not be required to either surrender or endure yet another trial.

As Judge Feinberg points out in his thoughtful dissenting opinion in the instant case, plaintiff's right to a jury trial has a constitutional basis, and is not lightly to be ignored. A remittitur is an invasion of the jury's prerogative and can be justified only in limited situations. Indeed, the opinion of this Court in *Dimmick v. Schiedt*, 293 U.S. 474, 484 indicated an uneasiness with the constitutionality of the entire practice of remittitur. When a remittitur is used the

coercive effect upon a plaintiff is very great. Not only must he sustain the burden of demonstrating to an appellate court that the trial judge was clearly mistaken or abused his discretion, but under the rule espoused by the majority he must first be able financially and intestinally to undergo the hardships and financial pressures of waiting for a second trial and undergoing it, obtaining perhaps a lower verdict, procuring the minutes of both trials, preparing the necessary post-trial motions, waiting for the judge's decision and only then embarking on the same appellate journey which may result in his obtaining what the constitutionally appointed fact-finders have determined to be fair and reasonable compensation for the wrong suffered by him at the hands of the defendant.

Reinertsen never lived to see a single dollar for the loss of his thumb, but had he survived he would have lost two-thirds of the amount which the trial judge found to be justified by the evidence as a consequence of his belief that the evidence supported the jury's award, and that the trial court was wrong to reduce it. Is this not too high a price to demand of a seaman whose injuries have been found to have been wrongfully inflicted? It is little wonder that, in the words of the majority opinion in this case, most plaintiffs "accept the remittitur and call it a day." The whole rationale behind the remittitur system is to pressure the plaintiff into taking less than that which a jury has awarded him, [6] and the system presently followed in the Second Circuit effectively deprives him of any real opportunity to challenge the judge's use of a remittitur. [7]

By no stretch of the imagination can this be called justice. The procedure urged by Donovan, however, is just.

---

6. "Chicago Note" at p. 380.

7. Even when plaintiff persists and succeeds in obtaining reinstatement of the jury verdict, it must be doubted whether the game is worth the candle. c.f. *Taylor v. Washington Terminal Company*, 409 F.2d 145 (D.C. Circ. 1969) where plaintiff was injured in 1963 and obtained his award six years later, after two trials and an appeal.

If the appellate court determines that the plaintiff has been wrongfully deprived of what the jury has awarded him, he will receive his award without further delay. If the remittitur is held proper, he receives only what both a judge and a jury have found he is entitled to. The proposed procedure puts plaintiff at parity with the defendant, who may immediately appeal from the trial judge's refusal to order a new trial or a remittitur, [8] or even from the inadequacy of a remittitur that was granted and accepted. Furthermore, although the trial judge can use the device of remittitur to reduce the award, he cannot use additur to increase it.[9] c.f. *Dimmick v. Schiedt, supra.* Allowing a plaintiff to appeal a remittitur "under protest" serves to reduce the imbalance. [10]

POINT II

THE ALLOWANCE OF AN APPEAL FROM A REMITTITUR ACCEPTED UNDER PROTEST DOES NOT OFFEND THE FINAL JUDGMENT RULE OF 28 USC 1291.

It must be remembered that by accepting the remittitur under protest the plaintiff waives his right to a new trial before a jury. Thus, while a remittitur accepted "under protest" may not be the traditional final judgment, the Fifth Circuit has pointed out that allowing a plaintiff in that situation to appeal is in accord with federal policy.

> "If the remittitur was in order, the plaintiff has agreed to it, the judgment would be final, and no new trial would be required. If the trial court erred in ordering the remittitur, the appellate court

---

8. *Dagnello v. Long Island R.R.*, 289 F.2d 797 (2nd Circ. 1961).

9. *Princemont Construction Corp. v. Smith*, 433 F.2d 1217 (D.C. Circ. 1970).

10. 536 F.2d ____.

could set aside the judgment and order that a judgment be entered on the jury verdict. Again no new trial would be necessary to conclude the litigation."

Wiggs v. Courshon, 485 F.2d 1283 (5th Circ. 1973) [11]

POINT III

DISALLOWANCE OF AN APPEAL FROM A REMITTITUR ACCEPTED UNDER PROTEST DENIES A SEAMAN EQUAL PROTECTION OF THE LAW.

Most seamen's injuries occur on the high seas and are essentially transitory causes of action. Suit may be brought under the Jones Act in either a state or federal court, and venue is proper wherever a defendant steamship company is doing business. Cases may sometimes be transferred for the convenience of parties and witnesses. [12] Many state courts allow an immediate appeal from an order of remittitur. [13] Thus, if Donovan's case had been tried in the courts of the State of New York, he would have been entitled to appeal immediately from the order of remittitur. Similarly, if Donovan had sued the defendant in the federal court in Florida or Louisiana or Texas for his injuries, he would have been entitled to an immediate appeal and would not have been subjected to the unjust pressures described in Point I, *supra*. This Court has recognized that uniformity of remedy in the maritime law is a desirable objective. c.f. *Moragne v. States Marine Lines*, 398 U.S. 375 (1970) and *Sea-Land Services v. Gaudet*, 414 U.S. 573

---

11. See the dissenting opinion of Judge Feinberg herein, 536 F.2d ____.

12. 28 U.S.C 1404(a).

13. *Mooney v. Henderson Portion Pack Co., supra*, 334 F.2d 7; *Gasser v. Olins Car Rental Inc.* (1975 NY) 47 A.D.2d 726; 367 N.Y.S.2d 954.

(1974). After 59 years, it may now be time for this Court to speak again on this issue and to resolve the conflict between the Circuits so that suitors in various Circuits will truly have equal protection of the law.

CONCLUSION

For the above reasons, a writ of certiorari should be granted as prayed for.

Respectfully submitted,

FREDERICK POSSES
Attorney for Petitioner

APPENDIX "A"

MEMORANDUM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRANCIS X. DONOVAN,

Plaintiff,

-against-

PENN SHIPPING CO., INC.
and PENN TRANSPORTATION CO., INC.,

Defendants.

APPEARANCES

PAUL C. MATTHEWS
New York, N.Y.
Attorney for Plaintiff

DARBY, HEALEY, STONEBRIDGE & WHELAN
New York, N.Y.
Attorneys for Defendants
THOMAS H. HEALEY, of Counsel

GURFEIN, D.J.:

MEMORANDUM

The defendants renew motions made at the end of a two day trial to set aside the jury verdict of $90,000 in favor of

the plaintiff seaman, and to enter judgment for the defendant and, alternatively, to order a new trial on the ground that the verdict was excessive.

The motions for judgment in accordance with defendant's motion for a directed verdict and for a mistrial are denied. Fed. R. Civ. P. 50(b).

For the reasons stated, the motion for a new trial on damages alone, see *Yates v. Dann,* 11 F.R.D. 386, 392 (D. Del. 1951), is granted on the ground that the jury verdict is excessive unless the plaintiff consents to a remittitur of the excess over $65,000.

Francis X. Donovan is a seaman, aged 54 years at trial in February, 1974. He had a maximum working expectancy of 11 years from the time he returned to work on December 1, 1970, or 14 years from the time of the accident. He had a life expectancy of 20 years. The plaintiff suffered an injury on board the SS PENN SAILOR on June 6, 1970. He was out of work for about six months.

The plaintiff sustained a colles fracture of the right wrist plus a dislocation and chip fracture of the right elbow. The residual effects were, in the plaintiff's own words, described as follows: "Well, I had problems in the sense that I didn't have a strong grip and if I did any heavy work my arm would ache me for several hours afterwards." On December, 1970 the Brighton Public Health Service had declared the plaintiff "fit for duty" and he then returned to his normal work.

Plaintiff's medical expert testified that the elbow is completely healed, leaving a fully functioning joint. There is a loss of motion in the wrist due in most part to a deviation in the wrist resulting from a misalignment in the fracture healing. There is some loss of strength in the hand and lack of full movement.

The plaintiff testified that he was losing 35 to 40 hours of overtime per week because of his condition. The overtime

rate was $3.44 per hour or $137.60 per month maximum loss of overtime on the basis of *all* 40 hours lost. There is inadequate proof of the applicable rate of premium pay for Saturdays, Sundays and holidays, but assuming that for 1/3 of the week the pay was $5.34 per hour as premium pay instead of $3.44 per hour, the jury could have added $1.90 per hour for 1/3 of 40 hours or 13 hours. That would add $24.70 to our overtime figure of $137.60, making it $162.30 for maximum overtime lost per working month.

Though the proof is far from convincing, let us assume that before the accident the plaintiff worked an average of 8 months per year and after the accident could work only 5 months per year. On that extreme assumption, he would have lost three months per year in the three years between his return to work and the trial and three months thereafter while his work expectancy continued.

Wages lost from December 1, 1970 to February, 1974

From December 1, 1970 to June 15, 1972 his base pay was $500.55 per month and his overtime pay was at the rate of $3.44 per hour. In the 19 months involved, it is assumed he lost 4-1/2 months (3 months per year) and 40 hours per month overtime. He would have lost as a maximum $500.55 x 4.5 months or approximately $2,252.00 plus 180 hours of overtime at $3.44 per hour, or $619.20 for a total of $2,871.20. From June 16, 1972 to June 15, 1973 the base pay was $555.88. On the same basis of computation the result is $2,080.44 in lost wages. From June 16, 1973 to February 1974 — 8 months, the base pay was $583.67. Assuming plaintiff lost the whole 3 months in that time, he would have lost $1,751.01 in base pay, and for 2/3 of the 40 hour lost overtime at $3.44 approximately another $90.00, plus premium overtime for 13 hours at $5.09 or $66.17 additional, totalling about $1,907.00. The grand total, from return to work to time of trial, would be $6,860.00. Defendant concedes, however, that a possible maximum

for the period would be an undiscounted loss of $8,400.00 and I shall raise my figure accordingly.

With respect to future losses in pay: the plaintiff would lose a maximum of three months a year base pay for a period of 11 years. Taking current base pay as $612.85 per month, he would lose 33 times that sum undiscounted, or $20,224.05. If we assume he lost overtime for the whole 8 months he would have worked on the basis of 40 hours per month or 320 hours per year. At basic overtime of $3.44 per hour the amount of loss per annum would be an additional $1,100.80. If we add to this $1.90 per hour premium for 13 hours a month or for 104 hours a year, we get an additional $197.60 per annum or a total per annum of an additional $1,298.40. Multiplying this by 11, we get an additional gross figure of $14,282.40. Adding this to the $20,224.00 we have already derived from the base pay loss we get approximately $34,506.00 as a maximum loss of wages over the entire period, on the assumption that the plaintiff would actually have worked all the overtime periods.

To recapitulate:

(a) $6,000 is accepted as loss of wages from June 1970 to December 1, 1970, return to work.

(b) $8,400 is the conceded figure by the defendant for return to work to trial.

(c) $34,506 is the maximum future damage from loss of future wages.

If $34,506 is discounted under the McWeeney formula which both parties accept, the discounted value is approximately $30,710.

The total is approximately $45,110.

The jury awarded $90,000 of which I must, hence, attribute about $45,000 to pain and suffering. This I feel is excessive. We are dealing with a fractured wrist and elbow, and even on the plaintiff's own version the pain is not constant.

Since I think it is right to allow the maximum possible in view of the plaintiff's right to trial by jury, I shall set the maximum for pain and suffering at $22,000. Assuming pain and suffering to be constant, the award for pain and suffering for the past four years is not discounted. For future pain and suffering 3/4 of $22,000 or $16,500 is discounted to $13,860 for pain and suffering for the remaining *sixteen* years of his life expectancy. This brings the total award to roughly $64,470 and permits extreme speculation by the jury that the pain would be constant day in and day out at the rate of $3 per day—a figure that has been recognized as reasonable in a case like this. See *Napolitano v. Compania Sud Americana De Vapores,* 421 F.2d 382, 384 (2 Cir. 1970).

Since I think the jury wished to award the maximum allowable, I shall set the remittitur at the excess above $65,000. On failure of acceptance of the remittitur by the plaintiff, a new trial will be ordered on damages alone. *Yodice v. Koninklijke Nederlandsche Stoom. Maat. v. Universal Terminal and Stevedoring Corp.*, 443 F.2d 76 (2 Cir. 1971); 6A Moore's Federal Practice, 59.05[3].

August 6, 1974

s/Gurfein
U.S.D.J.

APPENDIX "B"

MEMORANDUM DECISION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRANCIS X. DONOVAN,

Plaintiff,

-against-

PENN SHIPPING CO., INC., and
PENN TRANS CO., INC.,

Defendants.

HENRY F. WERKER, D.J.

A motion has been made by the defendants pursuant to Rule 59(e) of the Federal Rules of Civil Procedure for an order amending the judgment in this case entered on August 6, 1975. The defendants ask this court to make two changes: first, to disallow the plaintiff's acceptance of the remittitur under protest and second, to strike the award of pre-judgment interest and award interest only from the date of judgment.

The question of the propriety of accepting a remittitur under protest has recently been presented to but not decided by the Second Circuit. *See Reinertsen v. George W. Rogers Construction Corp.*, Civil No. 72-2155 (2d Cir., filed July 3, 1975). However, it is this court's view that this

form of a judgment should be permitted. If the Court of Appeals believes the order of remittitur to be in error, it can set aside the judgment and order that judgment on the jury verdict be entered; on the other hand, if the Court of Appeals believes the order to be proper, it can affirm the order and the judgment will be final. Either way, a new trial is not necessary.

The judgment granted the plaintiff interest from the date of the jury verdict, February 22, 1974. However, no judgment was actually entered until August 6, 1975. Section 1961 or 28 U.S.C. states that interest shall be calculated from the date of the entry of the judgment. In similar circumstances, the Second Circuit held that judgment could not be entered until a motion to set aside the verdict had been decided and that after the motion was granted, with leave to file a remittitur, interest was to be calculated from the date the judgment was noted in the civil docket book. *Murphy v. Lehigh Valley R.R.*, 158 F.2d 481 (2d Cir. 1947).

The defendants' motion is granted in so far as it seeks to strike the prejudgment interest award and to set August 6, 1975 as the date from which the interest due shall be calculated. In all other respects, the motion is denied.

SO ORDERED.

DATED: New York, New York
November 21, 1975

U.S.D.J.

APPENDIX "C"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 768—September Term, 1975.

(Argued April 12, 1976 Decided June 8, 1976.)

Docket No. 74-2694

FRANCIS X. DONOVAN,

Plaintiff-Appellant,

—v—

PENN SHIPPING CO., INC. and
PENN TRANS CO., INC.,

Defendants-Appellees.

Before:

LUMBARD, HAYS, and FEINBERG,

Circuit Judges.

Appeal from an order of remittitur, accepted "under protest," and entered in the Southern District, Werker, *J.*, on August 6, 1975.

Appeal dismissed.

PAUL C. MATTHEWS, ESQ., New York, New York, *for Plaintiff-Appellant.*

THOMAS M. MCCAFFREY, ESQ., New York, New York (Darby, Healey & Stonebridge and Thomas H. Healey, New York, New York, on the brief), *for Defendants-Appellees.*

PER CURIAM:

This case squarely presents for resolution a procedural question which has been the subject of extended discussion in several recent opinions of this court. In seeking review of a $65,000 judgment in his favor, entered in the Southern District on August 6, 1975 following a two day trial before Judge Gurfein and a jury, Francis X. Donovan urges that we modify the well established rule in this circuit and permit direct appeal from orders of remittitur accepted "under protest." We disagree with this suggestion.

Rather, having carefully weighed the competing policy considerations we remain convinced of the soundness of our traditional practice. If Donovan objected to Judge Gurfein's reduction of the jury's verdict, his proper recourse was to refuse the remittitur and insist upon the second trial to which he was entitled. Had he done so, the interlocutory nature of that choice would be readily apparent. Having chosen instead to accede to the remittitur, albeit reluctantly, Donovan is bound by his decision just as if he had reached a settlement with his adversary. The appeal is accordingly dismissed.

On June 4, 1970, while employed by the appellees as a seaman on the SS PennSailor, appellant slipped on wet paint and fell, suffering a colles fracture of the right wrist plus a dislocation and chip fracture of the right elbow. When the ship docked two hours later, Donovan was taken in a waiting ambulance to the Marine Hospital on Staten Island. There, the fractured wrist was reduced, the elbow put back into joint and a cast placed on the right arm. Appellant was fifty years old at the time of his accident.

Following a convalescence of approximately six months, Donovan returned to work on December 1, 1970, having been declared "fit for duty" by the Brighton Public Health Service. Despite this certification, which evidenced a medical appraisal that appellant was capable of resuming his full and normal responsibilities, Donovan indicated at trial that he has been losing 35 to 40 hours of overtime per week since his return as a direct result of his weakened condition. In addition, expert testimony below established that Donovan has suffered a loss of grip in his right hand and a diminution in mobility of his right wrist and elbow. Moreover, there is general agreement that, in the words of appellees' lawyer, the wrist has healed "off center."

In compensation for the injury which he incurred, the pain which he experienced and the earnings which he has been and will be denied, the jury awarded Donovan $90,000 in damages. Appellees then promptly moved to set aside the verdict as excessive. In an opinion rendered on August 6, 1974, Judge Gurfein granted the motion, held the award to be beyond that reasonably allowable and ordered a new trial unless appellant consented to a remittitur of $25,000.

For nearly one year appellant mulled his alternatives and the case remained in a state of limbo. Finally, Donovan submitted ex parte to the district court a proposed order which noted his acceptance "under protest" of the reduced verdict of $65,000 and purported to preserve his "right to appeal therefrom." This language was adopted by Judge Werker[1] and embodied in the judgment entered on August 6, 1975. Predictably, this appeal followed soon after. Appellant contends, inter alia, that the remittitur to which he agreed was based upon arithmetic miscalculation and represented an abuse of the trial judge's discretion.

1 Judge Werker was assigned to the case upon Judge Gurfein's elevation to the Court of Appeals.

We hold, however, that Donovan's acceptance of the remittitur precludes his present attack upon it.

Little would be gained by repeating what we so recently and at length considered in *Reinertsen* v. *Rogers*, 519 F. 531 (2d Cir. 1975) and *Evans* v. *Calmar*, Dkt. No. 75-7456 (2d Cir. April 16, 1976). Suffice to say that we disagree with appellant's basic contention that already over-extended judicial resources would better be husbanded by permitting immediate appeal from orders of remittitur. Were such a course available, a plaintiff would have nothing to lose by accepting a remittitur "under protest," thereby guaranteeing himself a minimum verdict, and then proceeding to the court of appeals in an effort to restore the sum which had been disallowed by the district judge.[2] The proliferation of appeals would be the inevitable consequence.

In contrast, experience has demonstrated that the interest in judicial administration is well served by the present practice of treating orders of remittitur as interlocutory and therefore unappealable. See *Woodworth* v. *Chesbrough*, 244 U.S. 79 (1917); 9 J. Moore, Federal Practice ¶ 203.06, at 721 n.31. As appellant conceded during oral argument, most plaintiffs now accept the remittitur thus necessitating a second trial in only a small minority of cases. Finality and repose are achieved precisely because "[t]he risks of a verdict less than the amount to which the remittitur order has reduced the plaintiff's recovery are . . . cal-

2 While some cost is undeniably involved in appealing a remittitur order, the incremental expense is relatively small in view of the fact that the parties will undoubtedly have already prepared and submitted memoranda of law to the district court. Whatever effort is required to revise these papers is, moreover, overshadowed by the possible return if the jury verdict is reinstated. We therefore see no merit in the argument that attorneys operating on a contingency fee basis would be reluctant to invest the additional time and energy needed to obtain direct review of the remittitur were an immediate appeal permitted.

culated to induce most reasonable plaintiffs to accept the remittitur and call it a day," *Evans,* slip op. at 3260.

That such risks are real was graphically illustrated in *Reinertsen,* where the first jury returned a verdict of $75,000, the order of remittitur reduced the award to $45,000 and the second jury granted just $16,000. The prejudice to the defendant in allowing the plaintiff to bypass the second trial and obtain direct review of the remittitur is therefore obvious. The defendant's right to have a second jury consider the issue of damages, although conditioned upon the plaintiff's having first rejected the remittitur, is nonetheless a valuable one. It should not be lightly disregarded. Furthermore, in those rare instances where a second trial is required, it provides yet an additional gauge by which the court of appeals can judge the propriety of the remittitur.

We therefore answer the question left open in *Reinertsen* and alluded to although not decided in *Evans,* by holding that a plaintiff who accepts an order of remittitur, with or without qualifications, is bound by his acceptance and may not later challenge the order by seeking review in the court of appeals. Donovan's attempted reservation of a right to appeal can not and does not alter this rule of law. Cf. *Sanford* v. *Commissioner,* 308 U.S. 39, 50-51 (1939).

Appeal dismissed.

FEINBERG, *Circuit Judge* (dissenting):

Plaintiff Francis X. Donovan obtained a jury verdict of $90,000 in his personal injury action against defendants-appellees. By utilizing the device of a remittitur, then District Judge Gurfein reduced plaintiff's recovery to $65,000. Plaintiff appeals, claiming that since he accepted the reduced judgment "under protest," he should have an

opportunity to argue to us that the trial judge erred in reducing the verdict. We must, therefore, reach the issue that only a year ago, in *Reinertsen* v. *George W. Rogers Construction Corp.,* 519 F.2d 531 (2d Cir. 1975), we discussed at some length, but did not find it necessary to decide.[1] That issue is whether to change the judge-made rule that the only way a plaintiff can challenge a judge's use of a remittitur is by first undergoing the risk, delay and expense of a second trial. The majority opinion holds plaintiff to that burdensome course. I respectfully dissent, since I believe that the "under protest" rule that plaintiff seeks is a reasonable way to preserve his right to protest allegedly undue interference with jury verdicts by trial judges.

My principal problem with the majority opinion is that, in adhering to the traditional rule, it gives inadequate consideration to all the interests involved. The majority's basic premise appears to be that the primary interest of the courts is the efficiency of judicial administration. This is not so. In civil matters like this one, courts exist to resolve disputes between litigants. When a plaintiff claims that he has been injured because of the fault of a defendant, the court proceeding is designed to give the plaintiff a fair opportunity to prove his contention and to obtain adequate compensation, if he is correct. Conversely, a defendant is afforded a fair chance to meet a plaintiff's contentions headon. The interest of the courts in efficient administration, though important, is not superior to the

---

1 For recent law review comment, see Note, Remittitur Practice in the Federal Courts, 76 Colum. L. Rev. 299 (1976); Note, Remittitur Review: Constitutionality and Efficiency in Liquidated and Unliquidated Damage Cases, 43 Chi. L. Rev. 376 (1976) ("Chicago Note"); Recent Developments, 44 Fordham L. Rev. 845 (1976); Note, Appealability of Judgments Entered Pursuant to Remittiturs in Federal Courts, 1975 Duke L.J. 1150 (1975) ("Duke Note").

interests of the plaintiff or of the defendant. Therefore, determination of plaintiff's right to appeal now should not depend, as the majority apparently believes, solely on whether there would be a "proliferation of appeals" as an "inevitable consequence"—a prediction, incidentally, which I would not make.[2]

A much more compelling consideration is whether the rule that a plaintiff cannot appeal from a remittitur, even one accepted "under protest," works a significant and unjustifiable hardship on him. It must be emphasized that consideration of this question starts with a plaintiff who has recovered a substantial verdict from a jury, substantial enough to have been reduced by a judge (in this case from $90,000 to $65,000). Plaintiff's right to the jury verdict has a constitutional basis, and is not lightly to be ignored. Granting a new trial unless a plaintiff accepts a remittitur is an attempt by a judge to reduce a jury verdict because he feels that it is excessive. To this extent, it is presumably an invasion of the jury's prerogative and the right of the plaintiff to its determination, and can be justified only in limited situations. A common formulation is that a trial judge should only interfere with a jury judgment on damages

> if the amount awarded is so excessive as to compel the conclusion that it is the result of passion or prejudice or is shocking to the "judicial conscience." [Footnotes omitted.]

Dagnello v. *Long Island R.R.*, 193 F. Supp. 552, 553 (S.D.N.Y. 1960), aff'd, 289 F.2d 797 (2d Cir. 1961); cf. *Taylor* v. *Washington Terminal Co.*, 409 F.2d 145, 147-49

2 The "proliferation" could only be in cases where a remittitur is ordered. Neither the majority nor I can cite hard statistics on the number of such cases in this circuit in any year, but my experience suggests that the total is not great.

(D.C. Cir. 1969). This statement assumes that judges are aware of a great many verdicts and that their consciences, in this context at least, are not too easily shocked. The formulation reflects an uneasiness over any tampering with a jury verdict. Cf. *Dimick* v. *Schiedt*, 293 U.S. 474, 484 (1934).[3]

When a remittitur is used, however, the coercive effect upon a plaintiff is very great. He is offered a reduced verdict right away. Should he refuse, in order to regain the full amount of the verdict he must first undergo the delay and trouble of a second trial, perhaps obtain a lower verdict,[4] and then try to persuade an appellate court that the trial judge erred in reducing the first verdict. It should be no surprise that, as the majority puts it, "most plaintiffs now accept the remittitur, thus necessitating a second trial in only a small minority of cases." If this is so,[5] it proves appellant's point, which is that the present system deprives him of any real opportunity to challenge the judge's use of a remittitur.[6]

3 On the question of the constitutionality of a remittitur, the Court noted:

> In the light reflected by the foregoing review of the English decisions and commentators, it, therefore, may be that if the question of remittitur were now before us for the first time, it would be decided otherwise.

Id. For the view that remittitur is "an unconstitutional practice" in personal injury actions like this one, see Chicago Note at 400.

4 Logically, if plaintiff secured any verdict higher than that deemed proper by the trial judge in his original order of remittitur, the trial judge would again set it aside, thus putting plaintiff on a treadmill until he obtained a lower verdict, accepted the remittitur or settled the case. See Chicago Note at 376.

5 Here, too, we have no hard statistics, but my educated guess would be the same as the majority's.

6 See Chicago Note at 380:

> . . . the whole rationale behind the remittitur practice is to pressure the plaintiff into taking less than that which a jury has awarded him.

On this analysis, then, the problem seems more difficult to me than it does to the majority. Why should we allow a plaintiff to be coerced into giving up his chance to challenge an alleged invasion of the jury's prerogative? I have difficulty in finding a satisfactory answer to that question. I recognize that the weight of precedent is against plaintiff. The authorities are discussed in *Reinertsen* v. *George W. Rogers Construction Corp.*, supra, in which we indicated our reluctance "to depart from the traditional rule." 519 F.2d at 536. Such an attitude is not unseemly for an inferior federal court but, as Justice Holmes pointed out over 75 years ago, it cannot be the whole answer.[7] Moreover, as we noted in *Reinertsen*, the authorities are not wholly one way. The Fifth Circuit, the busiest of all, has adopted the rule that appellant seeks. See, e.g., *Wiggs* v. *Courshon*, 485 F.2d 1281 (1973); *United States* v. *1160.96 Acres of Land*, 432 F.2d 910 (1970); 9 J. Moore, Federal Practice ¶ 203.06, at 722 (2d ed. 1975); 11 C. Wright and A. Miller, Federal Practice and Procedure, § 2815, at 105-06 & n. 10 (1973).

There is also the question whether a new rule is barred by various Supreme Court decisions, referred to in *Reinertsen*, supra, 519 F.2d at 534 & n.2.[8] The Fifth Circuit, however, has apparently assumed that these cases are distinguishable or have somehow lost their force in the many decades since they were decided.[9] At this point, I would be willing to accept the apparent assumption of the

---

7 "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV." Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897).

8 *Woodworth* v. *Chesbrough*, 244 U.S. 79 (1917); *Koenigsberger* v. *Richmond Silver Mining Co.*, 158 U.S. 41 (1895); *Lewis* v. *Wilson*, 151 U.S. 551 (1894); and *Kennon* v. *Gilmer*, 131 U.S. 22 (1889).

9 See Chicago Note at 377-81; Duke Note at 1155-61.

Fifth Circuit as correct, at least until such time as we are advised by higher authority that it is not.

Another obstacle to modifying the present rule might be the strong federal policy against piecemeal appeals embodied in the "final judgment" rule. However, while a remittitur accepted "under protest" might not be the traditional final judgment, the Fifth Circuit has pointed out that allowing a plaintiff in that situation to appeal is in accord with federal policy.

> If the remittitur was in order, the plaintiff has agreed to it, the judgment would be final, and no new trial would be required. If the trial court erred in ordering the remittitur, the appellate court could set aside the judgment and order that a judgment be entered on the jury verdict. Again, no new trial would be necessary to conclude the litigation.

Wiggs v. *Courshon*, supra, 485 F.2d at 1283. In *Reinertsen*, supra, 519 F.2d at 535, we noted that there was,

> of course, another possibility, namely, that the appellate court will reduce the remittitur. But the plaintiff's consent to the larger remittitur should certainly cover the smaller. Plaintiff contends that, with the policy of the final judgment rule thus satisfied, the interest of justice will be served by allowing an immediate appeal under these circumstances. If the plaintiff succeeds, the verdict will be restored in whole or in part without need for the parties to undergo a second trial. If the plaintiff fails, there will be judgment within what the trial judge considered to be the range of reason.

Therefore, it seems that appellant's proposed rule would not offend the policy of the final judgment rule.

On the other hand, there is the legitimate interest of a defendant to be considered. We also recognized in *Reinertsen* that a defendant can reasonably argue that

> the jury, if not prejudiced, at least must have been wrongheaded, and that [he] should not be placed in a position where if the remittitur is held proper, a plaintiff who is unwilling to accept it without an appeal will always get the maximum that a jury could reasonably fix rather than what a wiser jury might in fact award.

Id. Although there is some force to this argument, I do not think it is sufficient to justify the present rule. If the judge's remittitur is upheld on a plaintiff's direct appeal, the already reduced jury verdict is, by hypothesis, a justifiable one. A defendant, like a plaintiff, is entitled to no more than that. Moreover, the present practice concerning remittiturs already favors defendants. A defendant may immediately appeal from the trial judge's refusal to order a new trial or a remittitur, see, e.g., *Dagnello* v. *Long Island R.R.*, supra,[10] or even from the inadequacy of a remittitur that was granted and accepted.[11] But when the judge orders á remittitur, a plaintiff is not now given the same opportunity. Furthermore, a trial judge can reduce a plaintiff's verdict by the device of remittitur; the judge, however, cannot use additur to increase it. See *Dimick* v. *Schiedt*, supra, 293 U.S. at 495 (Stone, *J.*, dissenting). Changing the present rule to allow a plaintiff to appeal a remittitur "under protest" will reduce the imbalance.[12]

10 See also authorities collected in Chicago Note at 381 n.22.

11 E.g., *Princemont Construction Corp.* v. *Smith*, 433 F.2d 1217 (D.C. Cir. 1970).

12 Cf. Carrington, The Power of District Judges and the Responsibility of Courts of Appeals, 3 Ga. L. Rev. 507, 526 (1969) ("... the dubious and one-sided character of the whole process of regulating the size of verdicts ...").

On balance, then, I find no persuasive justification for the present rule except the economy of judicial effort stressed by the majority. We cannot even be sure of that, for we have no hard statistics as to how many remittiturs are rejected, thereby causing a second trial. We do know that in cases like *Reinertsen* the proposed rule would have avoided the second trial. Moreover, as indicated above, we do not know how many additional appeals will result from allowing a plaintiff, after accepting a remittitur under protest, to appeal from the judge's reduction of the verdict. And such appeals, whatever their number, would not usually require enormous expenditure of time and effort by lawyers or judges, although there will be exceptions.

In any event, I do not think that the interest in judicial administration should, in this instance, be controlling. I would change the rule and allow an appeal by a plaintiff who gives up his right to a new trial and accepts a remittitur "under protest." Otherwise, he is being coerced for insufficient reason into giving up a jury verdict that may be justifiable.

Therefore, I dissent.

APPENDIX "D"

ORDER DATED JUNE 8, 1976

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of June one thousand nine hundred and seventy-six.

Present:
HON. J. EDWARD LUMBARD
HON. PAUL R. HAYS
HON. WILFRED FEINBERG, C.JJ.

FRANCIS X. DONOVAN,

Plaintiff-Appellant,

v.

PENN SHIPPING CO., INC.,
and PENN TRANS. CO., INC.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the appeal from order

of said District Court be and it hereby is dismissed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

By: Vincent A. Carlin,
Chief Deputy Clerk

APPENDIX "E"

ORDER DATED AUGUST 4, 1976

At a stated term of the United States Court of Appeals, in and for the Second Citcuit, held at the United States Court House, in the City of New York, on the fifth day of August, one thousand nine hundred and seventy-six.

FRANCIS X. DONOVAN,

Plaintiff-Appellant,

-against-

PENN SHIPPING CO., INC.,
and PENN TRANS. CO., INC.,

Defendants-Appellees

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Plaintiff-Appellant, Francis X. Donovan, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/Irving R. Kaufman
IRVING R. KAUFMAN,
Chief Judge

Received August 6, 1976